# IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

CAROL S. LEVENSON,

Plaintiff,

VS.

JENNIE DEDEN BEHLES, GEORGE D. GIDDENS, Jr., JEANNE A. HAMRICK, JENNIFER STREET, and J. D. BEHLES & ASSOCIATES as Successor in Interest to BEHLES-GIDDENS, P.A.,

**CIV 98-0413 JC/LCS-ACE** 

Defendants.

# MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Defendant's MOTION FOR CLARIFICATION OF ORDER entered on January 27, 1999, CONCERNING COSTS TO BE REIMBURSED TO SUTIN, THAYER & BROWNE, P.C., and the Court having reviewed the memoranda submitted by Sutin, Thayer & Browne (hereinafter referred to as "STB"), the subpoenaed entity and the Defendant, and having heard the arguments of counsel, FINDS that the motion is not well taken and will be denied for at least two reasons. First, pursuant to the provisions of Rule 45 of the Federal Rules of Civil Procedure and its inherent power, the Court may make appropriate orders protecting those subpoenaed from undue financial hardship. Here, at a hearing held on January 27, 1999, the Court inquired of the STB firm as to the estimated charges for responding to the subpoena. That estimate was for \$5,000. It should come as no surprise to defendant that the STB bill was in fact \$5,000. The reasonableness of this amount could have been argued at the time. In view of the amount of work done as reflected in the STB billing, the amount is not unreasonable.

Secondly, the Court's order resulting from that hearing reads in part: "IT IS FURTHER ORDERED that, after the trial is concluded in this case, the Court will determine what percentage of the costs of producing these documents will be borne by which **parties**. This determination will not be based solely on which side prevailed in the litigation, but will instead depend upon what is ultimately fair and equitable." [Emphasis added]. The clear import of this language is that after trial, the Court would apportion the STB billing equitably among the **parties**. The case has now been settled and it must be assumed that the **parties** took the amount of the STB bill into account during their negotiations. In my view, to now significantly adjust that bill after negotiations and settlement would be wholly inappropriate.

Finally, at the January 27, 1999 hearing, Mr. Graves of STB represented that the billing of the attorneys would be for \$110 per hour. To the extent the billing reflects any higher hourly rate, it shall be reduced accordingly. Mr. Graves is to prepare a new billing reflecting that change and submit it to the Madison firm for payment.

IT IS SO ORDERED.

LESLIE C. SMITH

UNITED STATES MAGISTRATE JUDGE

We have conducted a number of univariate analyses, which have primarily relied on the use of generalized estimating equations (GEEs) (Hardin and Hilbe, 2003). GEE methods have allowed us to explore changes in key parameters in before-during-after phases of sound exposure as well as characterize some aspects of baseline behavior. This has resulted in three publications to date with others in preparation. More recently we have been exploring the use of these models for meta-analysis. Some of the methods developed to detect change-points in an individual's behavior in the presence of sound exposure have also been applied by project teams, such as the application of the Mahalanobis distance change-point method to data from a controlled exposure experiment (CEE) conducted on a Baird's beaked whale (Stimpert et al. 2015) and northern bottlenose whale (Miller et al. 2015). Other examples are currently being prepared for submission (e.g., minke whale, blue whale). We are preparing a manuscript which compares variants of the application of Mahalanobis distance techniques using simulated DTAG data, which will provide guidance to the community on the application of this method.

We have also made further progress in the application of process-based time series models such as hidden Markov models (HMMs) and other latent-state models to BRS data. We focus on the development of these models in the Results section. However, in terms of work completed we have seven manuscripts that are currently being prepared for submission, one on blue whales, one on sperm whales and a further five on pilot whales.

We have conducted a number of dose-response analyses using two different methods – a Bayesian hierarchical model and a Cox proportional hazards model. The focus over this year has been to use the Bayesian hierarchical model for meta-analysis across species. The results of this effort were presented and discussed at the final working group meeting and manuscript preparation is planned for the next fiscal year. The Cox proportional hazards model has been used in a recurrent event survival analysis framework to produce dose-response severity functions for a number of species. This has resulted in two publications (Harris et al. in press, Sivle et al. in press) and another is being prepared.

As well as leading on some research avenues, we have also provided support to the individual BRS projects when requested. This has led to a number of collaborative publications (see Publications below), with more in the preparation stage.

# **RESULTS**

In previous years we have reported on findings from the application of a Mahalanobis change-point detection method (DeRuiter et al. 2013) and on the application of a Bayesian hierarchical dose-response model (Antunes et al. 2014, Miller et al. 2014). The range of methodologies that have been developed and worked on during this fiscal year are described broadly in the Work Completed section. Here we will describe the development and application of HMMs, as these have been a focus in the latter part of the project.

HMMs are proving to be a useful tool in the BRS analysis toolkit as the deployment of animal-borne sensors is resulting in an increasing amount of complex multivariate time-series data being collected on a small number of individual animals. These models allow multiple metrics to be combined into one analysis, but they also explicitly acknowledge the time-series nature of the data, and provide an opportunity to explore behavioral states and the probability of transitioning between these states as a function of sound exposure. We have developed a suite of HMM model variants and generic code for their application to BRS data. These include methods for integrating data of differing resolutions from

multiple data streams, dealing with missing data and a formulation that includes a computationally efficient discrete random effect to account for the differences between animals. The method allows for effects of acoustic disturbance on both the between-state transition probabilities (e.g., decreased probability of foraging) and the state-dependent parameters (e.g., decrease in sound production during foraging).

We demonstrate the applicability of these models using two examples:

HMMs were used to quantify baseline behavior of 22 long-finned pilot whales tagged as part of the 3S and 3S2 projects. The dataset combines acoustic, movement and visual tracking data collected at different temporal resolutions and with missing values. Not all of the 22 tag records had concurrent acoustic or visual data (8 and 12 records, respectively). In these instances the HMM estimated the most likely behavior state based upon the available data alone while pooling information about the state-dependent distributions across the tag records. A two-step analysis allowed us to identify dives from breathing intervals, and further classify the dives into foraging, fast breathing, travelling and "common" dives (Figure 1).

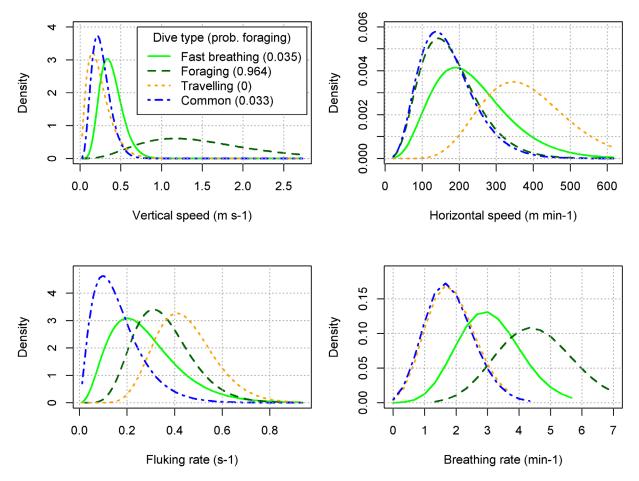


Figure 1: HMM analysis of pilot whale dives. The HMM was specified with state-dependent distributions that aimed to reflect the whales' energetic expenditure (breathing rate), movement effort (fluking rate) and speed of movement both vertically within a dive and horizontally (visual track). Foraging was also informed by the presence of echolocation clicks and variance in pitch, roll and heading.

To describe movement and diving behavior of blue whales tagged as part of the SOCAL project, we fitted an HMM, using the model's hidden states as a proxy for the underlying behavioral state of the animals. The model formulation includes an innovative discrete random effect to account for differences between animals, and also allows for effects of acoustic disturbance on the rates of transition between states. The model allowed us to identify three main blue whale dive types (shallow feeding (state 1), travel (state 2) and deep feeding (state 3)). We also quantified significant differences between whales in probabilities of transition between the dive types (behavioral contexts), and measured how blue whales responded to acoustic disturbance, with a reduction in deep foraging behavior and more shorter, shallower dives (Figure 2).

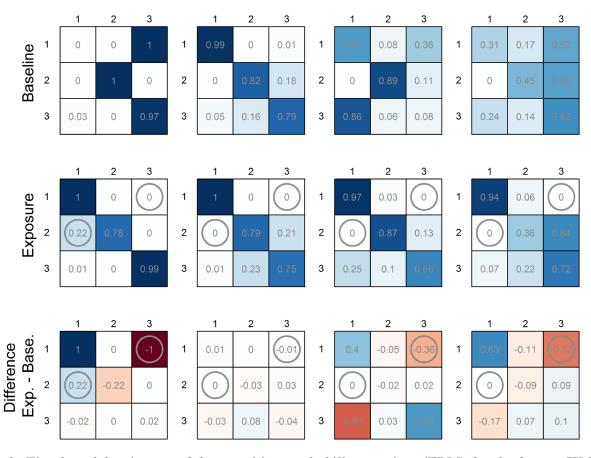


Figure 2: Fitted model estimates of the transition probability matrices (TPM) for the 3-state HMM with 4 behavioral contexts. In each matrix, state 1 most likely represents shallow feeding, state 2 represents travel and state 3 represents deep feeding. The 4 behavioural contexts account for variation in transition probabilities from whale to whale. Characteristics of the TPM for each context are, from left to right, very high persistence in states 2 and 3, and immediate transition from state 1 to 3 (if 1 is ever observed); high persistence in all three states, but with occupancy of state 3 quite; persistence in state 2 and some alternation between states 1-3; and highest probability of switching between states, with frequent transitions to state 3 from other states. For each context, the first row shows the TPM (in the absence of acoustic disturbance), the second row shows the TPM with acoustic disturbance, and the third row shows the difference between the two.

The magnitudes of the transition probabilities are indicated by the fill colour, as well as the printed numeric values in each cell. For the TPMs with acoustic disturbance, circles around the probabilities indicate entries corresponding to acoustic-disturbance parameters whose 95% confidence intervals do not contain zero.

#### **IMPACT/APPLICATIONS**

This project aims to significantly enhance the Controlled Exposure Experiments component of the Marine Mammals and Biology Program, and it will also address broader commitments of the Navy for environmental compliance. As part of rule making under the US Marine Mammal Protection Act, the Navy has committed to an Integrated Comprehensive Monitoring Program with the following objectives: monitor and assess the effects of Navy activities on protected marine species; ensure that data collected at multiple locations is collected in a manner that allows comparison between and among different geographic locations; assess the efficacy and practicality of the monitoring and mitigation techniques; add to the overall knowledge base of protected marine species and the effects of Navy activities on these species (Stone 2009). As part of its environmental compliance, the Navy must attempt to quantify the effect of sonar operations on marine mammals in all of its operating areas. This requires methods to estimate the relationship between acoustic dosage and other factors with behavioral responses. Here we have been developing frameworks for pooling data across studies and areas to develop more systematic models to quantify these effects.

#### RELATED PROJECTS

Data being analysed in the MOCHA project comes from a number of BRS projects that have focussed on different geographic areas and species. Below is a list of the projects providing data and links to websites with further information on each project, where available. More information about each project can be found in links listed at <a href="http://www.creem.st-and.ac.uk/mocha/links">http://www.creem.st-and.ac.uk/mocha/links</a>

- Sirena sonar trials on sperm whales
- BRS Bahamas (AUTEC): http://www.nmfs.noaa.gov/pr/acoustics/behavior.htm
- SOCAL BRS: http://sea-inc.net/socal-brs/
- 3S: http://soi.st-andrews.ac.uk/documents/424.pdf
- 3S2: http://www.ffi.no/no/Rapporter/11-01289.pdf
- Cape Hatteras: http://www.serdp.org/Program-Areas/Resource-Conservation-and-Climate-Change/Natural-Resources/Living-Marine-Resources-Ecology-and-Management/RC-2154/RC-2154

# Other related research projects are:

- BRREW This project is providing a review of the status and future of research into behavioral responses of marine mammals to naval sonar exposure.
- LATTE This three year project is developing and implementing statistical models that integrate passive acoustic monitoring data and animal-borne tag data to estimate the effect of Mid Frequency Active (MFA) sonar on beaked whales at AUTEC.
- M3R program This is the passive acoustics monitoring algorithms and tools development program at NUWC.
- PCADs This project aims to operationalize the Population Consequences of Acoustic Disturbance framework, focusing (currently) on four case study species, including beaked whales at AUTEC.

#### **REFERENCES**

- Papers referred to in the text that are MOCHA outputs are listed in the Publications sections.
- Hardin, J.W. and J.M. Hilbe. 2003. Generalized estimating equations. Chapman and Hall/CRC (ed), Florida, Boca Raton.
- R Core Team. 2015. R: A language and environment for statistical computing. R Foundation for Statistical Computing, Vienna, Austria.
- Stone, V.F. 2009. United States Navy Integrated Comprehensive Monitoring Program. Available at <a href="http://www.nmfs.noaa.gov/pr/pdfs/permits/socal">http://www.nmfs.noaa.gov/pr/pdfs/permits/socal</a> hrc icmp.pdf

### **PUBLICATIONS**

- 1<sup>st</sup> MOCHA Working Group Meeting Report, 2012. (Technical Report) Available at http://www.creem.st-and.ac.uk/mocha/project-outputs [published]
- 2<sup>nd</sup> MOCHA Working Group Meeting Report, 2012. (Technical Report) Available at http://www.creem.st-and.ac.uk/mocha/project-outputs [published]
- 3<sup>rd</sup> MOCHA Working Group Meeting Report, 2013. (Technical Report) Available at http://www.creem.st-and.ac.uk/mocha/project-outputs [published]
- 4th MOCHA Working Group Meeting Report, 2013. (Technical Report) Available at http://www.creem.st-and.ac.uk/mocha/project-outputs [published]
- 5th MOCHA Working Group Meeting Report, 2014. (Technical Report) Available at http://www.creem.st-and.ac.uk/mocha/project-outputs [published]
- Final MOCHA Working Group Meeting Report, 2014. (Technical Report) Available at <a href="http://www.creem.st-and.ac.uk/mocha/project-outputs">http://www.creem.st-and.ac.uk/mocha/project-outputs</a> [published]
- Antunes, A., Kvadsheim, P.H., Lam, F.P.A., Tyack, P.L., Thomas, L., Wensveen P.J. and P.J.O. Miller. 2014. High thresholds for avoidance of sonar by free-ranging long-finned pilot whales (*Globicephala melas*). Marine Pollution Bulletin, 83(1): 165-180. [published, refereed]
- Curé, C., Doksaeter-Sivle, L., Visser, F., Wensveen, P.J., Isojunno, S., Harris, C.M., Kvadsheim, P., Lam, F.P.A. and P.J.O. Miller. 2015. Predator sound playbacks reveal strong avoidance responses in a fight strategist baleen whale. Marine Ecology Progress Series 526: 267-282. [published, refereed]
- DeRuiter, S.L., Southall, B.L., Calambokidis, J., Zimmer, W.M.X., Sadykova, D., Falcone, E.A., Friedlaender, A.S., Joseph, J.E., Moretti, D., Schorr, G.S., Thomas, L. and P.L. Tyack. 2013. First direct measurements of behavioral responses by Cuvier's beaked whales to mid-frequency active (MFA) sonar. Biology Letters 9: 20130223. [published, refereed]
- Goldbogen, J.A., Calambokidis, J., Friedlaender, A.S., Francis, J., DeRuiter, S.L., Stimpert, A.K., Falcone, E. and B.L. Southall. 2012. Underwater acrobatics by the world's largest predator: 360°

- rolling maneuvers by lunge feeding blue whales. Biology letters vol. 9(1): 20120986. [published, refereed]
- Goldbogen, J.A., Southall, B.L., DeRuiter, S.L., Calambokidis, J., Friedlaender, A.S., Hazen, E.L., Falcone, E.A., Schorr, G.S., Douglas, A., Moretti, D.J., Kyburg, C., McKenna, M.F. and P.L. Tyack. 2013. Blue whales respond to simulated mid-frequency military sonar. Proc. Roy. Soc. B. 280(1765), 20130657. doi:10.1098/rspb.2013.0657 [published, refereed]
- Goldbogen, J.A., Stimpert, A.K., DeRuiter, S.L., Calambokdis, J., Friedlaender, A.S., Schorr, G.S., Moretti, D.J., Tyack, P.L. and B. L. Southall. 2014. Using accelerometers to determine the calling behavior of tagged baleen whales. Journal of Experimental Biology 21:2449-55. [published, refereed]
- Harris, C.M., Thomas, L., Sadykova, D., DeRuiter, S.L., Tyack, P.L., Southall, B.L., Read, A.J., and P.J.O Miller. 2015. The Challenges of Analyzing Behavioral Response Study Data: An Overview of the MOCHA (Multi-study OCean acoustics Human effects Analysis) Project. In: Popper, A. N. and Hawkins, A. eds. (2015). *The Effects of Noise on Aquatic Life II*. Springer Science+Business Media, LLC, New York. [published]
- Harris, C.M., Sadykova, D., De Ruiter, S.L., Tyack, P.L., Miller, P., Kvadsheim, P., Lam, F.P. and L. Thomas. In press. Dose response severity functions for acoustic disturbance in cetaceans using recurrent event survival analysis. Ecosphere [in press, refereed]
- Kershenbaum, A., Blumstein, D., Roch, M., and 40 others (including DeRuiter, S.L). 2014. Acoustic sequences in non-human animals: A tutorial review and prospectus. Biological Reviews. DOI: 10.1111/brv.12160 [published, refereed]
- Langrock, R., Kneib, T., Sohn, A., and S.L. DeRuiter. 2015. Nonparametric inference in hidden Markov models using P-splines. Biometrics 71(2): 520-528, DOI: 10.1111/biom.12282. [published, refereed]
- Miller, P.J.O., R.N. Antunes, P.J. Wensveen, F.I.P. Samarra, A. Catarina Alves, P.H. Kvadsheim, L. Kleivana, F.-P.A. Lam, M.A. Ainsle, P.L. Tyack and L. Thomas. 2014. Dose-response relationships for the onset of avoidance of sonar by free-ranging killer whales. Journal of the Acoustical Society of America. 135: 975. [published, refereed]
- Miller P.J.O., Kvadsheim, P.H., Lam, F.-P.A., Tyack, P.L., Curé, C., DeRuiter, S.L., Kleivane, L., Sivle, L.D., van IJsselmuide, S.P., Visser, F., Wensveen, P.J., and S.K. Hooker. (2015). Northern bottlenose whales are highly sensitive to noise disturbance. Royal Society Open Science. 2: 140484. [published, refereed]
- Sivle, L.D., Kvadsheim, P.H., Curé, C., Isojunno, S., Wensveen, P.J., Lam, F.P.A., Visser, F., Kleivane, L., Tyack, P.L., Harris, C.M. and P.J.O. Miller. In press. Severity of Expert-Identified Behavioral Responses of Humpback Whale, Minke Whale and Northern Bottlenose Whale to Naval Sonar. Aquatic Mammals. [in press, refereed]
- Southall, B.L., Moretti, D.J., Abraham, B., Calambokidis, J., DeRuiter, S.L., and P.L. Tyack. 2012. Marine mammal behavioral response studies in southern California: Advances in technology and experimental methods. Marine Technology Society Journal 46(4), 46-59. [published, refereed]
- Stimpert, A.K., DeRuiter, S.L., Southall, B.L., Moretti, D.J., Falcone, E.A., Goldbogen, J.A., Friedlaender, A.S., Schorr, G.S. and J.A. Calambokidis. 2014. Acoustic and foraging behavior of a tagged Baird's beaked whale (*Berardius bairdii*) exposed to simulated sonar. Scientific Reports 4, Article number 7031. doi:10.1038/srep07031. [published, refereed]

- Stimpert, A.K., Goldbogen, J.A., DeRuiter, S.L., Southall, B.L., Moretti, D.J., Falcone, E.A., Schorr, G.S., Friedlaender, A.S., Calambokidis, J., and P.L. Tyack. 2015. Sound production and associated behavior of tagged fin whales (*Balaenoptera physalus*) in the Southern California Bight. Animal Telemetry 3:23. [published, refereed]
- Visser F., Miller P.J.O., Antunes R.N., Oudejans M.G., MacKenzie M.L., Aoki K., Lam F.P.A., Kvadsheim P.H., Huisman J. and P.L. Tyack. 2014. The social context of individual foraging behavior in long-finned pilot whales (*Globicephala melas*). Behavior 151, 1453-1477. [published, refereed]
- Wensveen, P.J., Thomas, L. and P.J.O. Miller. 2015. A path reconstruction method integrating dead reckoning and position fixes applied to humpback whales. Movement Ecology 3:31 [published, refereed]